Malcolm Boring Co., Inc., B. C. Malcolm and Bruce C. Malcolm *and* Local 12, International Union of Operating Engineers, AFL-CIO

Off-Shore Drilling and Allied Workers Division of the National Maritime Union of America, AFL-CIO *and* Local 12, International Union of Operating Engineers, AFL-CIO. Cases 31-CA-9751 and 31-CB-3586

December 8, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 2, 1981, Administrative Law Judge Richard D. Taplitz issued the attached Decision in this proceeding. Thereafter, the Charging Party and Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust, hereinafter the Intervenor,[1] each filed exceptions and a supporting brief, and Respondents B. C. Malcolm and Malcolm Boring Co., Inc., filed a brief in answer thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

[1] On September 4, 1980, the Regional Director for Region 31 granted the motion to intervene filed by Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holiday Savings Trust and Operating Engineers Training Trust.

[2] The Charging Party and the Intervenor have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In finding Respondents Malcolm Boring and B. C. Malcolm a single employer, the Administrative Law Judge found, and the record reflects, a substantial degree of functional integration between the operations of the two Companies, including a high degree of employee interchange. Thus, B. C. Malcolm is the name of the sole proprietorship under which Billy C. Malcolm does business, and he, along with his wife, owns all of the stock of Malcolm Boring. The record further reflects in this regard that Respondents maintain a common pool of employees who are each day assigned by Billy C. Malcolm to either field or shop work; and that when a particular employee is sent to the field to perform construction work, he is placed on the payroll of Malcolm Boring, but if assigned to the yard to perform maintenance, repair, and fabrication work, he appears on the payroll of B. C. Malcolm. Such assignments are made as the need arises and are based upon the relative skill level of any particular employee. The record is thus indicative of Respondents' common ownership and management and central control of labor relations. Despite the finding of single-employer status, the Administrative Law Judge correctly concluded that the employees of Malcolm Boring and the employees of B. C. Malcolm each constitute a separate unit, and also correctly relied upon the ambiguity of the relevant contract language as well as upon the practice of 3 years' duration of not applying the collective-bargaining agreement with Malcolm Boring to employees working on the B. C. Malcolm payroll. In so finding, and apparently seeking to further buttress his conclusion that separate units are appropriate herein, the Administrative Law Judge inaccurately characterized the nature of Respondents' businesses and the manner in which they interact. Thus, in the context of his analysis with respect to unit scope, the Administrative Law Judge described the B. C. Malcolm business as being "substantially different" from the Malcolm Boring business, and appeared to indicate that this difference required each Company to recruit and hire individuals with certain skills of use only to one Company or the other. A perusal of the facts in support of the Administrative Law Judge's single-employer finding clearly shows his later characterizations of Respondents' businesses to be erroneous. Thus, B. C. Malcolm not only supplies the machinery with which Malcolm Boring performs construction work, but also keeps such equipment operational with an object of minimizing "down time" in the field. In addition, and equally important, is Respondents' utilization of a common pool of employees to meet their staffing requirements, as well as the fact that these employees are often used interchangeably as field or yard personnel, likewise indicative of the commonality of Respondents' purposes. Finally, it should be noted that Malcolm Boring leases almost all of its equipment from B. C. Malcolm, and that the greatest percentage of B. C. Malcolm's leasing, repair, and fabrication business is with Malcolm Boring. To the extent that the Administrative Law Judge's analysis with respect to unit scope detracts from his single-employer finding, we do not rely thereon. However, as indicated above, this error does not affect the result herein. For, we agree with the Administrative Law Judge's ultimate conclusion that, in light of the evidence as to the intent of the parties, the employees of B. C. Malcolm are in a separate bargaining unit from the employees of Malcolm Boring.

Finally, since the record reflects that Billy C. Malcolm and his wife own all the stock of Malcolm Boring, we need not reach the issue of whether a "substantial" stock interest by them would likewise exclude any of their children from the appropriate unit herein. See, generally, *Cerni Motor Sales, Inc.*, 201 NLRB 918 (1973).

In dismissing the complaint herein, Member Fanning finds it unnecessary to rely on *A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.*, 250 NLRB 217 (1980).

[3] In the absence of exceptions, we adopt, *pro forma*, the dismissal of certain allegations that Respondents violated Sec. 8(a)(1) of the Act.

lations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard at Los Angeles, California, on September 9, 10, 15, 16, 17, 18, 23, and 24 and November 12 and 14, 1980. On February 6, 1981, I granted the motion of the National Maritime Union and reopened the hearing. By order dated February 24, I approved a stipulation relating to the receipt in evidence of NMU's Exhibit 1 and closed the hearing.

The charges in Cases 31-CA-9751 and 31-CB-3586 were filed on January 31, 1980, by Local 12, International Union of Operating Engineers, AFL-CIO, herein called Local 12. An order consolidating those cases and a complaint issued on March 28, 1980. The complaint alleges that Malcolm Boring Co., Inc. (herein called Malcolm Boring), B. C. Malcolm and Bruce C. Malcolm,[1] all of whom are alleged to be single employers, violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, as amended. The complaint also alleges that Off-Shore Drilling and Allied Workers Division of the National Maritime Union of America, AFL-CIO (herein called NMU), violated Section 8(b)(1)(A) and (2) of the Act. On September 4, 1980, the Regional Director for Region 31 of the Boand granted the motion to intervene of Operating Engineers Pension Trust, Operating Engineers Health and Welfare Fund, Operating Engineers Vacation-Holidays Savings Trust and Operating Engineers Training Trust (herein called the Operating Engineers Trusts).

ISSUES

The primary issues are:

1. Whether Malcolm Boring, B. C. Malcolm and Bruce Malcolm, Inc., constitute a single employer.

2. Whether the bargaining unit in a collective-bargaining contract between Local 12 and Malcolm Boring is broad enough to cover the employees of B. C. Malcolm and Bruce Malcolm, Inc.

3. Whether that contract was an enforceable pre-hire construction industry contract and whether the named employers violated Section 8(a)(5) of the Act by refusing to honor said contract with regard to employees of B. C. Malcolm and Bruce Malcolm, Inc.

4. Whether those employers violated Section 8(a)(1), (2), (3), and (5) and NMU violated Section 8(b)(1)(A) and (2) of the Act when Bruce Malcolm, Inc., and NMU entered into a collective-bargaining agreement.

5. Whether those employers interrogated and threatened employees in violation of Section 8(a)(1) of the Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs that have been carefully considered were filed on behalf of the General Counsel, Malcolm Boring, B. C. Malcolm, Bruce Malcolm, Inc., NMU, Local 12, and Operating Engineers Trusts.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS

Malcolm Boring, a California corporation, with an office and principal place of business in Chino, California, is engaged as a contractor and subcontractor in horizontal boring in the construction industry.[2] The parties stipulated and I find that Malcolm Boring annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside California. Malcolm Boring is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

B. C. Malcolm is a sole proprietorship with an office and place of business in Chino, California, where it manufactures, maintains, and repairs equipment that it rents and occasionally sells to various employers in the horizontal boring business including Malcolm Boring. The parties stipulated and I find that B. C. Malcolm does more than $50,000 a year business with Malcolm Boring, which Company is engaged in interstate commerce on other than an indirect basis. B. C. Malcolm is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Bruce Malcolm, Inc., was a sole proprietorship and now is a corporation with an office and place of business in Chino, California. It is engaged in the business of horizontal boring and pipe jacking.[3] Its business records estsblish that, during the year immediately preceding issuance of complaint, Bruce Malcolm, Inc., had sales in excess of $50,000 to Malcolm Boring. Bruce Malcolm, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Local 12 and NMU are and each is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction*

Billy Carlisle Malcolm, referred to herein as Billy C. Malcolm, is a principal in two businesses. He is president and, together with his wife, is owner of Malcolm Boring. Malcolm Boring is engaged in the horizontal boring business as a subcontractor for piping contractors and as a

[1] On April 25, 1980, Bruce C. Malcolm incorporated as Bruce C. Malcolm, Inc. To avoid confusion with names, all references to the business will be Bruce Malcolm, Inc., and all references to the individual will be to Bruce Malcolm.

[2] Horizontal boring consists of the drilling of a hole under a highway, railway, track, or similar installation so that casings, pipes, and the like can be installed without damaging the installation.

[3] Pipe jacking is a hand mining operation, while horizontal boring involves the use of boring machinery.

contractor for utilities. The horizontal boring work is done at the site of the construction and constitutes construction industry work. Since 1962, Malcolm Boring has had a collective-bargaining agreement with Local 12. That contract began as a pre-hire agreement and contained an 8-day union-security clause that is lawful in the construction industry. As is discussed in detail below, there is a substantial question as to the scope of the bargaining unit covered by the contract.

Billy C. Malcolm is engaged in business as a sole proprietorship under the name B. C. Malcolm. B. C. Malcolm manufactures, maintains, and repairs equipment that it leases and sometimes sells to various employers in the horizontal boring business. B. C. Malcolm is a manufacturer and supplier of machinery for the horizontal boring business. It is not in itself engaged primarily in the building and construction industry.

Malcolm Boring and B. C. Malcolm maintain separate payrolls. Some employees are on both payrolls. When they work in the field on construction work, they are considered employees of Malcolm Boring and are paid and given fringe benefits in accordance with contract terms. When the same employees works on the fabrication, repair, or maintenance of machinery in B. C. Malcolm's shop, they are placed on the B. C. Malcolm payroll and are paid 80 percent of the contract rate without any fringe benefits.[4]

The General Counsel contends that Malcolm Boring and B. C. Malcolm are part of a single employer, that the employees of both are part of a single bargaining unit encompassed by the contract between Malcolm Boring and Local 12, and that the Employers who constitute the single employer have violated Section 8(a)(5) of the Act by failing to honor the contract with regard to employees of B. C. Malcolm. The Employers, on the other hand, contend that they are not part of a single employer, that the contract between Local 12 and Malcolm Boring covers only Malcolm Boring employees and that there is no refusal to honor the contract. They also argue that there is no obligation for the contract to be honored in that it is a pre-hire construction industry contract and no appropriate showing of majority status has been made.

In addition to having two companies Billy Malcolm has three sons. Two of those sons have chosen to go into the horizontal boring business. One son, William C. Malcolm, does business under the name William Malcolm Construction, Inc. There is no contention that that company is part of the single employer. Another son, Bruce Malcolm, does business under the name Bruce Malcolm, Inc. The General Counsel contends that Bruce Malcolm, Inc., is part of the single employer with Malcolm Boring and B. C. Malcolm. The General Counsel's position is that the employees of Bruce Malcolm, Inc., are covered by the collective- bargaining agreement between Malcolm Boring and Local 12. Bruce Malcolm, Inc., contends that it is not part of a single employer and that in any event it has no employees who could be covered by that bargaining unit.

Bruce Malcolm, Inc., entered into a collective-bargaining agreement with NMU. That agreement contained a union-security clause. The General Counsel contends that Bruce Malcolm, Inc., entered into that collective-bargaining agreement with NMU at a time when it had a duty to honor an outstanding agreement with Local 12 and that, by entering into the contract with NMU, Bruce Malcolm, Inc., and the remainder of the single employer violated Section 8(a)(1), (2), (3), and (5) of the Act, while NMU violated Section 8(b)(1)(A) and (2) of the Act.

B. *The Relationship Between Malcolm Boring and B. C. Malcolm*

1. Factual findings

a. *Interrelation of operations*

There is a substantial degree of functional integration between the operations of B. C. Malcolm and Malcolm Boring. Malcolm Boring performs horizontal boring work on construction sites. The machinery used by Malcolm Boring is supplied by B. C. Malcolm, who manufactures, maintains, repairs, and leases out that equipment. Although B. C. Malcolm has other customers, most of its business is done with Malcolm Boring and almost all of Malcolm Boring's equipment comes from B. C. Malcolm.

There is a substantial amount of employee interchange between the two Companies.[5] Almost all of the boring machine operators and skilled helpers who worked in the field for Malcolm Boring have been assigned on various occasions to work in the shop for B. C. Malcolm. When the employee works in the field, he is carried on the books of Malcolm Boring and receives pay and fringes based on Malcolm Boring's contract with Local 12. When the same employee is assigned to the yard for maintenance, repair, or other work, he is placed on B. C. Malcolm's books and paid 80 percent of the contract rate without any fringe benefits.

B. C. Malcolm and Malcolm Boring share the same office, which is located at 5849 Shaefer Avenue, Chino, California. They also share the same yard, which is located near the office on property belonging to B. C. Malcolm. The office is adjacent to Billy C. Malcolm's home. Malcolm Boring leases office and yard space from B. C. Malcolm.

B. C. Malcolm and Malcolm Boring keep separate books and separate bank accounts. They both use the same bank. They share the services of an office secretary, Hazel Zurich. B. C. Malcolm pays Zurich's salary 1 week a month and Malcolm Boring pays the other 3 weeks. B. C. Malcolm and Malcolm Boring have telephone numbers that differ by one.

[4] The only exception to this appears to be the payment of certain fringe benefits after a contested claim on behalf of W. C. Malcolm in 1975. William C. Malcolm is a son of the owners of Malcolm Boring and as such could not be part of the bargaining unit. See fn. 17 below.

[5] This procedure was followed until January 1980. In December 1979, Local 12 Business Representative Bob Dye told Billy Malcolm that the Union would strike and close Malcolm Boring down if Local 12 personnel were not used for maintenance work. From that time on, B. C. Malcolm has not manufactured any boring equipment. B. C. Malcolm has shipped out heavy repair work to other concerns and has had minor repair work done by employees of Malcolm Boring. B. C. Malcolm has closed down its payroll.

b. *Common ownership and management*

B. C. Malcolm is the name of the sole proprietorship under which Billy C. Malcolm does business. Billy C. Malcolm averred that, under the California community property law, his wife owns half of the business. Billy C. Malcolm and his wife own all of the stock of Malcolm Boring.

In addition to the common ownership of the two concerns, there is to a substantial degree a common management. As sole proprietor, Billy C. Malcolm has sole control over the affairs of B. C. Malcolm. He decides to whom B. C. Malcolm will rent equipment and makes all management decisions relating to B. C. Malcolm. As president of Malcolm Boring, Billy C. Malcolm also makes management decisions with regard to that Company. In addition to being president, he is on the board of directors. Although his wife and some of his children have at times been corporate officers and on the board of directors, Billy C. Malcolm is clearly in charge. In testifying about the history of his Companies, Billy C. Malcolm averred that in 1962 his accountant advised him to split his business into two parts so that the equipment would be owned personally and he could lease it to the corporation. He averred that he kept his business in two parts because of tax and liability advantages.

c. *Centralized control of labor relations*

Billy C. Malcolm makes all labor relations decisions for B. C. Malcolm. He is the one who does hiring and firing for that Company. When employees report for work each day, Billy C. Malcolm is the one who decides whether to assign them to fieldwork as employees of Malcolm Boring or to shopwork as employees of B. C. Malcolm. If he assigns an employee to shopwork, he supervises the work of that employee. If he assigns the employee to fieldwork, he retains ultimate authority over that employee, but the employee is immediately supervised by a foreman or superintendent on the job. In 1979, Carl Jarnagan was general superintendent and vice president of Malcolm Boring and it was he who supervised crews in the field. At that time Jarnagan also hired employees for Malcolm Boring. In late 1979, Jarnagan resigned as vice president and superintendent and he went back to foreman status. In regard to wages and hours there is complete centralization of control over labor relations. Billy C. Malcolm acknowledged in his testimony that except as limited by contract he is the one who sets wages and hours for both B. C. Malcolm and Malcolm Boring.

2. Analysis and conclusions

In *Blumenfeld Theatres Circuit, et al.*, 240 NLRB 206, 214 (1979), enfd. 626 F.2d 865 (9th Cir. 1980), the Board affirmed the decision of an administrative law judge in which the tests for "single employer" were set forth as follows:

> In *Radio & Television Broadcast Technicians Local Union 1264, IBEW* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965), the Supreme Court held that in determining whether enterprises constitute a single employer: "The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership."[16] Though the Board and the courts have not always agreed on how to apply the standards enunciated by the Supreme Court, the decision of the Court of Appeals for the District of Columbia in *Local No. 627, International Union of Operating Engineers, AFL-CIO [South Prairie Construction Company and Peter Kiewit Sons' Co.]* v. *N.L.R.B.*, 518 F.2d 1040 (1967), appears to be controlling. In that case the court of appeals reversed the Decision of the Board in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 206 NLRB 562 (1973). Part of the circuit court's decision was affirmed by the United States Supreme Court in *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers, AFL-CIO*, 425 U.S. 800 (1976). The Board had made two separate findings. The first was that two entities did not constitute a single employer and the second was that each entity had a separate appropriate bargaining unit for collective-bargaining purposes. The court of appeals disagreed and found both a single employer and a single unit. On appeal the Supreme Court affirmed that part of the court of appeals' decision which found that the two entities were a single employer and reversed and remanded to the court of appeals that part of the decision which related to the unit question.[17] As the Supreme Court has affirmed the circuit Court's decision with regard to the single employer, the language of the circuit court is of particular importance. That circuit court held [518 F.2d at 1045–46]:
>
> *Guidelines for "Single Employer" Status*
>
> In *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 . . . (1965), the Supreme Court, in a *per curiam* opinion affirming a "single employer" holding below, said:
>
> The controlling criteria, set out and elaborated in Board decisions, are interrelation of operations, common management, centralized control of labor relations and common ownership.
>
> The court cited several NLRB decisions including one affirmed in *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F.2d 902 (9th Cir. 1964), cert. denied, 379 U.S. 961 . . . (1965). In *Sakrete*, the Ninth Circuit stated, at 907:
>
> even if the substantial evidence shows interrelationship of operations, centralized control of

[16] See also *Sakrete of Northern California, Inc.*, 140 NLRB 765 (1963), enfd. 332 F.2d 902 (9th Cir. 1964) cert. denied 379 U.S. 961 (1965).

[17] On remand the Board issued a Supplemental Decision reported at 231 NLRB 76 (1977) in which it noted that the Supreme Court had affirmed the circuit court's finding that the two entities were a single employer. The Board reconsidered the single-unit question and concluded that, even though the entities were a single employer, separate units were appropriate.

labor relations, or common management only at the executive or top level, we do not agree that this precludes application of the "single employer" concept.

It pointed out that these three criteria "deal not with power and authority, as such, but with its exercise," and that such criteria, "on any level, are considerations in addition to the factor of common ownership or financial control."[8]

Although the Supreme Court in *Radio Union, supra*, commented that the record in that case was more than adequate to show that all of the four "controlling criteria" were present, it does not appear that all four criteria must be present. In one of the NLRB cases cited, *Canton, Carp's, Inc.*, 125 NLRB 483 (1959), the Board observed that it had on several occasions made a finding of a single employer status in the absence of a common labor relations policy, and even when it had been affirmatively shown that each of two corporations held to be a single employer established its own labor relations policy. In another of the NLRB cases cited, *V.I.P. Radio, Inc.*, 128 NLRB 113 (1960), the Board found that there was little or no employee interchange; but 90 percent stock ownership of the second corporation, the same officers and directors, and centralized control of "general labor policy" and operations resulted in a "single employer" holding. In still another cited NLRB case, *Overton Markets, Inc.*, 142 NLRB 615 (1963), the Board noted, at 619, that the circumstances were not "characteristic of the arm's length relationship found among unintegrated companies."[9] Its conclusion that there was a "single employer" for purposes of the Act rested on consideration of "all the circumstances" of the case.

From the foregoing, we conclude that "single employer" status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case, that not all of the "controlling criteria" specified by the Supreme Court need be present; that, in addition to the criterion of commom ownership or financial control, the other criteria, whether or not they are present at the top level of management, are "controlling" indicia of the actual exercise of the power of common ownership or financial control and that the standard for evaluating such exercise of power is whether, as a matter of substance, there is the "arm's length relationship found among unintegrated companies."

As set forth above, Malcolm Boring and B. C. Malcolm have interrelated operations, common management, centralized control of labor relations, and commom ownership. They meet all of the criteria set forth by the Supreme Court for finding a single employer. Where surrounding circumstances warrant it, the finding of single employer can be made even when all of the "controlling criteria" are not present. In the instant case all of the controlling criteria are present and there are no surrounding circumstances that would interfere with the finding that Malcolm Boring and B. C. Malcolm do constitute a single employer. I find that they are a single employer. It does not follow, however, that the employees of Malcolm Boring and B. C. Malcolm are all part of a single bargaining unit or that they are all covered by Malcolm Boring's collective- bargaining agreement with Local 12. The unit issue is discussed in section D below.

C. *The Relationship Between Bruce Malcolm, Inc., and the Single Employer*

1. Factual findings

a. *Interrelations of operations*

Bruce Malcolm, Inc., and Malcolm Boring are both engaged in the horizontal boring business.[6] The primary interrelation between Bruce Malcolm, Inc., and Malcolm Boring relates to subcontracting. Malcolm Boring is a long established enterprise and Bruce Malcolm, Inc., went into business during the last week of September 1979. During the initial phases of Bruce Malcolm, Inc.'s operation, all of its work was subcontracted from Malcolm Boring. At that time Malcolm Boring had a substantial amount of overflow work that it could not perform, as did many other established employers in the horizontal boring business. Some of that overflow work Malcolm Boring subcontracted to Bruce Malcolm, Inc. Gradually Bruce Malcolm, Inc., began accepting subcontracts from different contractors. From September 1979 through August 1980 Malcolm Boring subcontracted approximately 5 percent of its total work to Bruce Malcolm, Inc. During the same time, those subcontracts amounted to approximately 30 percent of all the work that Bruce Malcolm, Inc., performed.

Some of Bruce Malcolm, Inc.'s employees worked for Malcolm Boring before they went to work for Bruce Malcolm, Inc. However, with two very limited exceptions none of them worked for Malcolm Boring at the same time that they did work for Bruce Malcolm, Inc. One exception applied to Larry Cochell, who was employed by Malcolm Boring. Cochell was a friend of Bruce Malcolm's and on a few occasions he helped Bruce Malcolm with repair work on off-hours and on a Saturday. The other exception applied to a part-time secretary who worked for Bruce Malcolm, Inc., 1 or 2 days a week after January 1980. She was also a part time clerical employee for Malcolm Boring. Those were iso-

[8] In a later decision, *N.L.R.B.* v. *Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), the Ninth Circuit, citing *Sakrete*, said that no one of the four criteria is controlling.

[9] The "arm's length" test makes meaningful the Board's reference in *Canton, Carp's, Inc., supra* at 484, to "realities of commercial organization." It was applied by this court in *American Fed. of Television & Radio Artists* v. *N.L.R.B.*, 149 U.S. App. D.C. 272, 462 F.2d 887 (1972).

[6] Bruce Malcolm also does some pipe jacking work. Malcolm Boring does not engage in that type of business.

lated situations and did not amoumt to a meaningful interchange of employees.[7]

Bruce Malcolm, Inc., owns most of the equipment that it uses. Before Bruce Malcolm, Inc., went into business, Bruce Malcolm leased to Malcolm some equipment that it owned. Boring. However, that lease was canceled before the new business was started. There was some loaning and interchange of equipment among various employers in the horizontal boring business, but there is no showing that there was more of that between Bruce Malcolm, Inc., and Malcolm Boring than there was between other employers in that industry.[8] Bruce Malcolm, Inc., did come to the Malcolm Boring yard on various occasions to pick up casings. On those occasions Malcolm Boring was supplying the casing for his subcontractor, Bruce Malcolm, Inc. Other subcontractors who accepted subcontracts from Malcolm Boring used a similar procedure. On one occasion, Bruce Malcolm, Inc., performed some work on his own equipment while he was in Malcolm Boring's yard. That was an isolated incident and occurred because Malcolm Boring had the extra room needed for that type of work.

Bruce Malcolm, Inc., maintains its own office, is located about 3 miles away from the offices of Malcolm Boring and B. C. Malcolm, and maintains its own yard, located 7 or 8 miles from the Malcolm Boring and B. C. Malcolm yard. Bruce Malcolm, Inc., maintains its own books and has a telephone number that is different from that of Malcolm Boring and B. C. Malcolm. Malcolm Boring, Inc., does not have its own contractor's license, but it is in the process of applying for one. It has never used the contractor's license of Malcolm Boring or B. C. Malcolm.

I find that there is no interrelation of operations between Malcolm Boring and Bruce Malcolm, Inc., except to the extent that Malcolm Boring subcontracts some of its work to Bruce Malcolm, Inc. However, the evidence does not establish that the contractor-subcontractor relationship is other than an arm's-length transaction.

[7] Cochell testified that he was paid in cash and that Billy C. Malcolm told Bruce not to pay him by means other than cash. Bruce Malcolm averred that it was Cochell who asked to be paid in cash and both he and Billy C. Malcolm denied that Billy C. Malcolm said anything about the means of payment for Cochell. Both Billy C. Malcolm and Bruce Malcolm impressed me as being candid witnesses with good memories. Cochell's demeanor was less impressive and a number of internal inconsistencies within his testimony and with regard to previous statements indicated that his memory was less than completely reliable. Where his testimony conflicts with that of Billy C. Malcolm and Bruce Malcolm, I credit the Malcolms.

On one occasion a crew from Malcolm Boring took over work that had been performed by a crew from Bruce Malcolm, Inc. In that situation, the prime contractor, Irish Construction Company, was put under pressure from Local 12 to remove Bruce Malcolm, Inc.'s nonunion employees from the job. Irish Construction called Malcolm Boring with the result that Malcolm Boring removed its subcontractor, Bruce Malcolm, Inc., from the job and completed the work with its own employees. That constituted a removal of a subcontractor rather than an interchange of employees.

[8] Cochell testified that, in October 1979, he used a crane belonging to Bruce Malcolm, Inc., while he was working for Malcolm Boring and that, on various occasions, he saw Malcolm Boring's markings on trucks used by Bruce Malcolm, Inc. However, I do not believe Cochell was reliable with regard to dates. Bruce Malcolm creditably testified that his lease of equipment to Malcolm Boring ended before he went into business and that after he went into business his equipment had its own markings.

b. *Common management*

At one time Bruce Malcolm worked for Malcolm Boring as a boring machine operator. He was also director and vice president of Malcolm Boring. However, before going into business for himself, he quit his job at Malcolm Boring and resigned as a director and vice president.[9]

Billy C. Malcolm manages the operations of Malcolm Boring and B. C. Malcolm. Bruce Malcolm manages the operations of Bruce Malcolm, Inc., and has no control over the affairs of Malcolm Boring or B. C. Malcolm. Billy C. Malcolm has no control over the affairs of Bruce Malcolm, Inc., except to the extent that is implicit in the relationship between a contractor and a subcontractor.

In sum, I find that there is no common management between Bruce Malcolm, Inc., and Malcolm Boring or B. C. Malcolm.

c. *Centralized control of labor relations*

As set forth above, except as he is limited by his collective bargaining agreement with Local 12, Billy C. Malcolm has sole control over wages, hours, and labor relation matters for Malcolm Boring and B. C. Malcolm. Bruce Malcolm neither has nor exercises any authority in that regard.

Bruce Malcolm is the only supervisor of Bruce Malcolm, Inc. He has sole power to hire and fire employees and, in general, is in sole charge of the business including labor relations. Billy C. Malcolm has no authority over labor relations policies for Bruce Malcolm, Inc.[10]

Bruce Malcolm, Inc., has a collective-bargaining agreement with NMU. The General Counsel contends that Billy C. Malcolm was responsible for the execution of that contract and to that extent controlled the labor policies of Bruce Malcolm, Inc. The evidence does not support the General Counsel's contention. Sometime in the summer of 1979, Billy C. Malcolm received a phone call from an ex-employee named Bob Seabury, who was organizing for NMU. Seabury asked whether Billy C. Malcolm could give him the names of some nonunion contractors. Seabury also said that he was not interested in organizing anyone who currently had a contract. Billy C. Malcolm gave Seabury the names of a number of contractors including Bruce Malcolm. At that time Bruce Malcolm had already resigned from Malcolm Boring and was building some equipment that he could use when he began his business. The equipment was being built in a

[9] Bruce Malcolm terminated his employment with Malcom Boring on or about August 1, 1979. At that same time he resigned as officer and director, although that resignation was not reduced to a written document until December 1, 1979. Bruce Malcolm is still listed as an individual who is authorized to draw checks on a small cash account for Malcolm Boring. However, Bruce Malcolm credibly testified that he was left on that account as a matter of inadvertence, that he had forgotten about it, and that he did not draw checks on it. Bruce Malcolm acknowledges in his testimony that, in an affidavit he gave to the Board, he stated that his father bid jobs for him. He credibly testified that his affidavit was poorly worded, that his father did not actively bid jobs for him, and that when his father had overflow work that had been bid on, his father requested him to take the job.

[10] As found above, the testimony of Cochell to the effect that Billy C. Malcolm directed Bruce Malcolm to pay cash for Cochell's services has not been credited.

location other than that of Malcolm Boring or B. C. Malcolm. Sometime thereafter Billy C. Malcolm had a meeting at his house in which Seabury spoke to a number of the contractors including Bruce Malcolm, Inc. Bruce Malcolm asked for suggestions from a number of people including his brother, his father, and Ralph Ayalla of A-1 Boring Company. Ayalla was a business acquaintance and competitor of Billy C. Malcolm and Billy C. Malcolm had asked him to give Bruce Malcolm suggestions. On September 21, 1979, Bruce Malcolm met with Seabury and negotiated and executed a collective-bargaining agreement. The contract was effective by its terms from September 21, 1979, to September 20, 1980.

David Frederick, an employee of Malcolm Boring, testified that, in late August or early September 1979, Billy C. Malcolm told him that he (Malcolm) had negotiated a contract for Bruce Malcolm with NMU, that Bruce Malcolm was going to try that union, and that B. C. Malcolm was considering signing with NMU or having his sons or other partners trying out the NMU if it worked with Bruce. Billy C. Malcolm denied that the conversation even took place. He denied that he told Frederick that he (Malcolm) had negotiated a contract for Bruce Malcolm and he denied that he in fact negotiated such a contract. As set forth above, I believe that Billy C. Malcolm was a candid and credible witness. Frederick on the other hand, was not always candid. In a deposition he stated that in early summer of 1979, Bruce Malcolm told him that he (Bruce) intended to go into business for himself. In his testimony at the hearing, Frederick denied any recollection of the conversation. He also testified that it first came to his attention in October 1979 that he was not getting paid union scale for his work in the yard. By that time he had been working both in the field and the yard for a substantial period of time and it is difficult to believe that he was so unaware of his pay. As between Frederick and Billy C. Malcolm, I credit Billy C. Malcolm.

In sum, I find that there was no centralized control of labor relations between Bruce Malcolm, Inc., and Malcolm Boring or B. C. Malcolm.

d. *Common ownership*

As set forth above, Billy C. Malcolm and his wife own Malcolm Boring and B. C. Malcolm. Bruce Malcolm has no financial interest in those concerns. Bruce Malcolm and his wife are the sole owners of Bruce Malcolm, Inc. Billy C. Malcolm and his wife have no financial interest in Bruce Malcolm, Inc. In sum, there is no common ownership, nor are there common officers, directors, or property.

2. Analysis and conclusions

The principles of law set forth above in section B,2, must be applied to the instant situation. The evidence establishes that there is interrelation of operations, common management, common centralized labor relations, and common ownership between Malcolm Boring and B. C. Malcolm. The conclusion follows that they are a single employer. The evidence is just as clear, however, that there is no interrelation of operations, no common management, no centralization of labor relations, and no common ownership between Bruce Malcolm, Inc., and either Malcolm Boring or B. C. Malcolm. There is a family relationship and there is an arm's length contractor-subcontractor relationship, but neither of those relationships can form the basis for a finding of single employer. I find that Bruce Malcolm, Inc., is a separate employer and is not a single employer with Malcolm Boring or B. C. Malcolm.

In order to find that Bruce Malcolm, Inc., and NMU violated the Act as alleged in the complaint, it is necessary as a condition precedent to find that the Bruce Malcolm, Inc., is a single employer with Malcolm Boring. The refusal- to-bargain allegation is predicated on the proposition that Bruce Malcolm, Inc., had a bargaining obligation and a collective-bargaining contract with Local 12 because it was a single employer with Malcolm Boring who did have such an obligation and contract. There is no allegation or proof that Bruce Malcolm, Inc., as a separate employer had an obligation to bargain or honor a contract with Local 12. As the single-employer theory has not been established, the 8(a)(5) refusal-to-bargain allegation against Bruce Malcolm, Inc., must be dismissed. The allegations that Bruce Malcolm, Inc., violated Section 8(a)(1), (2), and (3) and that NMU violated Section 8(b)(1)(A) and (2) of the Act are predicated on the theory that Bruce Malcolm, Inc., and NMU entered into a collective bargaining agreement containing a union-security clause at a time when Bruce Malcolm, Inc., had an obligation to bargain and honor a collective-bargaining agreement with Local 12. As Bruce Malcolm, Inc., did not have any such obligation toward Local 12, there is no showing that its contract with NMU was unlawful.[11] It follows that the 8(a)(1), (2), and (3) violations alleged against Bruce Malcolm, Inc., and the 8(b)(1)(A) and (2) violation alleged against NMU must be dismissed.

D. *The Scope of the Bargaining Unit*

1. The collective-bargaining contract and the practices thereunder

Malcolm Boring was incorporated on July 31, 1961. At that time and through the mid-1970's, Malcolm Boring's work was limited to drilling bore holes and it employed only two classes of employees. One was the operator who ran the machinery and the other was a helper who assisted the operator. Also in the early days of its operation, Malcolm Boring owned only a small amount of equipment and mostly small tools. Sometime in 1962, on the advice of his accountant, Billy C. Malcolm split the business into two parts. He owned the equipment personally and leased it to the corporation.

On March 1, 1962, Malcolm Boring entered into a short-form agreement with Local 12 under which they agreed to be bound by the terms of the applicable multiemployer agreement and to any renewals and extensions thereof unless written notice was given 60 days prior to the termination of the applicable agreement. At the bottom of the short-term agreement were a number

[11] It is noted that Bruce Malcolm, Inc., is an employer engaged primarily in the building and construction industry and that, therefore, the prehire agreement is not in itself unlawful.

of boxes indicating what type of agreement was intended. The box next to "construction" was checked. The box next to "shop" was left blank. The master labor agreement to which the parties bound themselves was the Southern California General Contractors and Local 12 agreement which ran from June 15, 1962, to June 1, 1965. A covering letter from the Union, as well as the language of the contract, made it clear that the contract covered the Los Angeles, but not the San Diego, area. The master labor agreement was between a number of different contractor associations and Local 12. By its terms, it covered all work within the geographical area of the contract falling within the recognized jurisdiction of Local 12. The coverage clause of the contract stated that it would cover not only a great number of specified types of work, but also "work in the contractors' yards, and shops which is performed on equipment operated by employees covered by this Agreement." Although Billy C. Malcolm owned the equipment and B. C. Malcolm was in existence, B. C. Malcolm did not have any payroll. No payroll was set up for B. C. Malcolm until 1976.

When Malcolm Boring signed the short-form agreement in 1962, none of its employees was a member of Local 12. Within a week after the signing two employees joined the Union.[12]

Over the years Malcolm Boring had considerable difficulty in obtaining skilled workmen through the Union's hiring hall. As a result Malcolm Boring hired unskilled employees and trained them. Under the practice that developed the unskilled employees were not entitled to join the Union and were not covered by the union contract. The general practice was for Malcolm Boring to train the inexperienced men for about 2 years. When an employee reached certain degree of proficiency, Billy C. Malcolm went to Local 12 and sought to have the Union accept the employee into membership.[13] When an employee became sufficiently skilled, he was brought into the Union and became eligible for the wages and benefits set forth in the contract. Billy C. Malcolm credibly testified that his experience was that, from 1962 until 1977 or 78, the Union only took skilled operators into membership and that he had to practically fight on a number of occasions in order to get the Union to take someone into membership. At the point that an employee joined the Union, he was considered a skilled helper and as such was entitled to coverage by the contract.[14]

The next master labor agreement was from July 1, 1965, to July 1, 1969. Malcolm Boring was bound by that agreement under the terms of the short-form agreement that it signed in 1962. The work covered by that contract was substantially the same as that covered in the previous contract. It specifically mentioned work in the contractors' yards and shops, which was performed on equipment operated by employees covered by the agreement. During the term of that contract, B. C. Malcolm still did not have a yard and employees on the payroll. Malcolm Boring continued to "put people in the Union" when they reached a certain degree of proficiency at which time they were paid contract rates and benefits.

The situation remained substantially unchanged until the master labor agreement of July 1, 1974, to July 1, 1977.[15]

Malcolm Boring was bound by that master labor agreement through its execution of the 1962 short-form agreement. At that time, Malcolm Boring had not yet given any notice of cancellation. The new master agreement had some changes with regard to the unit, but it continued to include work in the contractors' yards and shops.

During the terms of the new contract, Malcolm Boring's business was expanded. Before that time, Malcolm Boring restricted its work to the drilling of the bore holes. During this period the work expanded to include the digging of pits from which the bores were made, the putting of pipes in the holes, and various filling operations. Malcolm Boring began to use more unskilled labor than it previously had. While there had only been two classes of employees (operators and operators' helpers) there was added a third classification of unskilled laborers. As a result, sometime in 1977 Local 12 insisted that Malcolm Boring sign a contract with the Laborers Union. Malcolm Boring signed such a contract. Some problems were presented because many classifications overlapped in both the laborers and Local 12 contracts. Prior to the Laborers contract Malcolm Boring hired unskilled men who remained nonunion until they were qualified, at which time they would be taken into Local 12 and treated as operators under the union scale. After Malcolm Boring signed the Laborers contract, it recruited employees from the Laborers Union.[16] When those employees became sufficiently trained, they were made operators and switched to Local 12. Basically there were three classes of employees. The first was the unskilled worker, who was primarily hired for muscle power. The second was the semiskilled helper, who assisted the operator, and the third was the skilled operator. The Laborers union claimed jurisdiction over the unskilled worker, Local 12 claimed jurisdiction over the operators, and both Unions had arguable claims for jurisdiction over the helpers.

Before January 1976 the repair and maintenance work on equipment used by Malcolm Boring was performed on a more or less hit-and-miss basis. Some of it was farmed out to other employers and some of it was done

[12] The record is unclear as to how many employees Malcolm Boring had at that time. At one point in this testimony, Billy C. Malcolm averred that those were the only two employees he had. Shortly thereafter, he averred that he usually had four or five employees during the early part of his operations. Still later he averred that he did not remember exactly how many employees he had at the time he signed the Local 12 contract but, normally at that period, he had two boring machines and each machine took two employees to run it. He averred that to the best of his recollection he had four men working at that time, but he did not remember how skilled or unskilled two of them were.

[13] David Frederick credibly testified that at a certain point in his employment Billy C. Malcolm asked him whether he would like to join the Union and, when he said that he would, Billy C. Malcolm took care of it and he became a member.

[14] On one occasion Local 12 demanded that there be a certain number of operating engineers on a job and insisted that two men who were performing laborers' work at that time join Local 12. Two of the men did join Local 12.

[15] That was the next contract that was put into evidence.

[16] In addition to hiring employees from the Laborers Union, Malcolm Boring also hired some nonunion employees at particular jobsites.

by members of the Malcolm family.[17] In some cases, employees were hired and put on the payroll. Most of the work was done by Ralph Ayalla, who had his own welding shop and billed Malcolm Boring for the work. The situation changed in 1976 when B. C. Malcolm set up its own payroll. At that time, Billy C. Malcolm intended to try to sell some of his boring equipment and to take his sons in as partners. His plans did not work for a number of reasons including the fact that his sons wanted to go into business on their own. From then on, B. C. Malcolm had employees of its own, who worked at the B. C. Malcolm shop. The work those employees performed was substantially different from the work performed by the employees of Malcolm Boring. Malcolm Boring employees worked on construction work in the field. The skills required ranged from those of ditchdiggers to those of skilled boring machine operators. The work performed by employees of B. C. Malcolm was done in the shop and ranged from the tidying up of the place and the washing of equipment to skilled mechanic's work. The B. C. Malcolm business was also substantially different from the Malcolm Boring business. Malcolm Boring performed construction work. B. C. Malcolm fabricated, maintained, repaired, and leased out construction equipment. The equipment was leased to a number of contractors in addition to Malcolm Boring.

It is contended that, because Malcolm Boring had signed the short-form agreement in 1962 and had not notified the Union to the contrary, it became bound by the master labor agreement of July 1, 1977, to June 15, 1980.[18] However, the new master labor agreement for Southern California substantially changed the bargaining unit from that which had appeared in prior contracts. While the prior contracts had been between employers and Local 12, the new master labor agreement was between employers and a number of different unions, only one of which was Local 12. Various Carpenter unions, Laborer unions, and Teamster unions were also lumped together in the contract. Article II,A, provided that the employers recognized the unions as "the sole and exclusive collective bargaining representatives of all employees and persons employed to perform work covered by this agreement." Article I,B,5, stated, "This agreement shall cover and apply to all work falling within the recognized jurisdiction of the Unions signatory to this agreement." There followed three subparagraphs describing the work covered. Subparagraph (a) provided:

> It shall cover work on building, heavy highway, and engineering construction, including the construction of, in whole or in part, or in improvement or modification thereof, including any structure or operations which are incidental thereto, the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities . . . including without limitation the following types of classes of work:

Subparagraphs (b) and (c) set forth a large listing of different types of construction industry work.[19] Subparagraph 6 covered:

> All work performed in the contractors' warehouses, shops or yards which has been particularly provided or set up to handle work in connection with a job or project covered by the terms of this agreement.

The language of that section appears to indicate that the preceding section, insofar as it covered fabrication, maintenance, and repair, was limited to such work on the jobsite. Subparagraph 6 went beyond that and covered some shopwork. However, it would not cover the shopwork in question in this case. Here the B. C. Malcolm shop was not set up to handle work in connection with a particular job or project. However, the new contract did have an appendix that was entitled "Operating Engineers Craft, Special Working Rules and Wage Scales." That appendix contained a clause which stated that, in addition to the basic agreement coverage, the agreement would include work in the contractors' yards and shops. B. C. Malcolm and Malcolm Boring claimed that that clause did not apply to them because the original 1962 short-form agreement between Malcolm Boring and Local 12, which was the underpinning of the subsequent agreements was solely a construction contract and not a shop contract as indicated by the check in the box next to construction and blank left after the box for shop. Local 12 contends that the effect of checking the box next to the shop agreement was to allow the company to vary certain starting times and overtime rates in the shop as provided by section W of the appendix to the contract. However, it is difficult to see how the 1962 short-form agreement could have anticipated the language in the 1977 contract. It is more reasonable to assume that the short form agreement meant just what it said, that construction was covered and shop was not. At the very least, the language is ambiguous and it is necessary to examine the practices of the parties to understand what they meant by it.

[17] Some of the work was done by the sons of the owners of Malcolm Boring who, because of their relationship to the owner of the business, could not be considered employees in an appropriate bargaining unit. Children of persons holding a substantial stock interest in a closely held corporation must be excluded from bargaining units of that corporate employer. *Foam Rubber City #2 of Florida, Inc. doing business as SCANDIA*, 167 NLRB 623 (1967).

[18] The Southern California master agreement does not include San Diego County. On September 27, 1978, Malcolm Boring signed a short-form agreement with Local 12 covering the San Diego area. The box for "Master Construction Agreement" was checked; the box for "Master Shop Agreement" was not. It was actually signed in San Diego County, while Malcolm Boring was doing some work there. The short-form agreement specifically states on the bottom,"San Diego Horizontal Earth Boring." The full agreement to which the short-form agreement refers specifically limits the coverage of the contract to San Diego County. Therefore, it can have no application to B. C. Malcolm, who does no work in that county. However, the only contract alleged in the complaint is the one that was entered into September 27, 1978, which would be the San Diego contract. In fact, the General Counsel's contentions are keyed to the 1962 short-form agreement which covers the area where B. C. Malcolm works rather than the September 27, 1978, short-form agreement which only covers the San Diego area.

[19] The contract provided that, when the employer was making work assignments, he would assign work in accordance with existing intercraft agreements between the Unions and that, where there was no such agreement, then past practice or prevailing practice in the locality would apply.

As set forth above, the practice that developed over the years was for Malcolm Boring to apply the contract only to those employees who reached a certain level of skill as operators. Such employees joined Local 12 and became eligible for contract benefits at the same time. Until the incidents in question in this case, Local 12 does not appear to have demanded contract coverage for lesser skilled employees. Nor is there any indication that the Union insisted on enforcement of the union-security clause for those employees. Until the incidents in question in this case, there is no indication that either Local 12 or Malcolm Boring made any effort to apply the contract to B. C. Malcolm shop employees. The first situation in which the question arose was about June 21 or 23, 1979. At that time, Bruce Malcolm was still an official of Malcolm Boring. He was working on a Malcolm Boring job in Anaheim, California, when Local 12 Business Agent Novak spoke to him. Novak said that he had a grievance from an employee named Newton about a difference in wages that was paid in the yard and in the field. Bruce Malcolm told Novak that 80 percent of the field wages were paid while an employee was in the yard and there were no fringes paid, but that the employee kept working steadily when it rained and when work was slow. Novak replied by saying that it was not a bad deal.

In mid-October 1979, David Frederick made a complaint about his pay to Local 12 Business Representative Robert Dye. Frederick was one of the employees who did fieldwork on the Malcolm Boring payroll at full contract rates and also did shopwork on the B. C. Malcolm payroll at 80 percent of contract rate without fringe benefits. Frederick explained the situation to Dye. In December 1979, Dye went to the Malcolm Boring office and discussed the matter with Billy C. Malcolm. Billy C. Malcolm explained the structure of B. C. Malcolm and Malcolm Boring and in effect confirmed what Frederick had told Dye previously. Dye took the position that the contract covered shopwork and Billy C. Malcolm took the position that it did not.[20] That dispute led to this litigation.

By letter dated January 28, 1980, Malcolm Boring notified the Union that it desired to bargain separately for a new agreement at the expiration of the contract in 1980. The letter also asked for a copy of the current contract for Southern California and for the Union's position with regard to what was timely notice of termination. By letter dated January 30, 1980, Malcolm Boring notified the engineering contractors association that the association did not have authority to represent the company in collective bargaining. By letter dated February 22, 1980, Malcolm Boring notified Local 12 of the termination of both the San Diego and the Southern California agreements to be effective on the applicable termination dates of those contracts. In that letter Malcolm Boring offered to negotiate and asked that a meeting be scheduled. By letter dated March 24, 1980, Local 12 acknowledged receipt of Malcolm Boring's letter canceling the contract. Local 12 referred to Malcolm Boring's letter as "Letter of cancellation of your Short Form Agreement for Construction." Local 12 notified Malcolm Boring that its agreement was tied to the terms of the master agreement which did not terminate until July 1, 1980, for Southern California and June 15, 1980, for San Diego. Local 12's letter also stated that Local 12 would hold Malcolm Boring's letter until the conclusion of the term of the master agreements and, at that time, Local 12 would contact Malcolm Boring for the purpose of collective bargaining.

On December 31, 1980, the attorneys for Local 12 wrote to the attorneys for Malcolm Boring a letter[21] which stated in part:

> Because Local 12 no longer represents a majority of Malcolm's employees, it has decided to disclaim interest in bargaining for these employees. Therefore, Malcolm Boring shall be considered a nonsignatory employer and shall be treated accordingly.

2. Analysis and conclusions

Malcolm Boring and B. C. Malcolm constitute a single employer. However, that does not answer the question whether the two parts of the single employer had single or separate bargaining units. As the Board held in *Peter Kiewit Sons' Co. and South Prairie Construction Co.*, 231 NLRB 76, 77 (1977), enfd. 595 F.2d 844 (D.C. Cir. 1979):

> In determining whether a single employer exists we are concerned with the common ownership, structure, and integrated control of the separate corporations; in determining the scope of the unit, we are concerned with the community of interests of the employees involved.
>
> Section 9 of the Act gives the Board considerable discretion in determining appropriate units. Section 9(b) of the Act empowers the Board to "decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." The mandate of that section "to assure to employees the fullest freedom" indicates that our primary concern is the degree of common interests of the employees involved. The ultimate unit determination is thus resolved by weighing all the factors relevant to the community of interests of the employees. Where, as here, we are concerned with more than one operation of a single employer, the

[20] Dye testified that, during this conversation, Billy C. Malcolm told him that he was going to go out of business and was going to lease his equipment to his son Bruce. However, Gannon, another union representative who was at the meeting, made contemporancous notes in which he quoted Billy C. Malcolm as saying that he would be going out of business and leasing his equipment to a son other than Bruce. I believe that Dye was confused with regard to the names of the sons. Dye testified that Billy C. Malcolm told him that Bruce Malcolm was an officer of Malcolm Boring. Billy C. Malcolm averred that he did not tell Dye that Bruce Malcolm was an officer but he might have told him that Thomas Malcolm was. At that time Bruce Malcolm had his own business. I believe that Dye was again confused with regard to the names.

[21] On the stipulation of the parties the letter was received as evidence as a late-file exhibit and was marked NMU Exh. 1. The stipulation went to the question of authenticity and all parties reserved their rights to argue or challenge in their briefs the relevancy or any other matters relating to that exhibit.

> following factors are particularly relevant; the bargaining history; the functional integration of operations; the differences in the types of work and the skills of employees; the extent of centralization of management and supervision, particularly in regard to labor relations, hiring, discipline, and control of day-to-day operations; and the extent of interchange and contact between the groups of employees.

The facts with regard to those criteria are set forth in detail in the discussion of the single-employer issue above and will not be repeated here. However, other considerations of particular importance must be mentioned. The skills needed by the employees of B. C. Malcolm are substantially different from those of the employees of Malcolm Boring. That is so because the work of the two Companies is of a very different nature. Malcolm Boring is wholly engaged in a construction business. The skills required of the employees are those of construction workers on the construction site. B. C. Malcolm fabricates, maintains, repairs, and leases equipment to construction firms. Its employees need skills appropriate to those tasks and the work is performed in the shop. Malcolm Boring is a construction industry employer and B. C. Malcolm is not. B. C. Malcolm is not simply a minor adjunct of Malcolm Boring. It is a substantial business in its own right[22] and leases equipment to a number of other construction firms in addition to Malcolm Boring. Malcolm Boring signed a short-form agreement with Local 12 in 1962 and it is alleged that, through that short-form agreement, it is bound by the Southern California Master Labor Agreement of July 1, 1977, to July 15, 1980. That master labor agreement is a construction industry agreement and it contains an 8-day union-security clause that is lawful when applied to "an employer engaged primarily in the building and construction industry."[23] It is unlawful when applied to an employer who is not engaged primarily in the building and construction industry.[24] The original contract between Malcolm Boring and Local 12 was a pre-hire agreement which incorporated a union-security clause. That also could be lawful only where the employer was primarily in the building and construction industry. The Southern California Master Agreement of 1977–80 contains clauses limiting the right of employers to subcontract onsite construction work to other employers. Those clauses could not have any meaning with regard to B. C. Malcolm who does no onsite work.[25] If the employees of B. C. Malcolm are lumped into the Malcolm Boring bargaining unit and covered by the master labor agreement, the nonconstruction employees of B. C. Malcolm would not only be bound by a pre-hire contract where the majority representation status could arguably be attributed to the union-security clause, but would also be subject to the requirement that they join Local 12 on the eighth day after their employment.

[22] From July 1979 through June 1980 B. C. Malcolm's volume of business from rental and sales of equipment was approximately $228,780. From August 1979 through July 1980 Malcolm Boring's volume of business from construction industry work was approximately $1,283,165.

[23] Sec. 8(f) of the Act.

[24] Sec. 8(a)(3) of the Act.

[25] Sec. 8(e) of the Act.

Moreover, it is basic Board policy to accept the voluntary agreement of the parties as to the scope of the unit. As the Board held in *A-1 Fire Protection, Inc., and Corcoran Automatic Sprinklers, Inc.*, 250 NLRB 217, 220 (1980):

> In resolving disputes over the scope of a bargaining unit, the Board's starting point consistently had been its policy of accepting voluntary agreements between parties on unit scope, whether made as part of a voluntary recognition agreement or entered into in a Stipulation for Certification Upon Consent Election. In light of this policy, the Board's analysis of such a dispute includes an examination of the agreed-upon unit and an examination of the circumstances surrounding the alleged agreement on unit scope to determine whether it in fact reflects the intent of the parties and constitutes a voluntary agreement.

In that case, the Board found that the two parts of a single employer had separate bargaining units in a "double-breasted operation," where one of the parts performed nonunion construction work and the other performed union construction work.

In determining what the agreement was with regard to the scope of the unit, it is necessary to consider both the contract and the practice of the parties. In the instant case, there is a serious question whether there even is a contract. In 1962 Malcolm Boring signed a short-form agreement with Local 12. It bound itself to an agreement with that union and with no other. The Southern California Master Labor Agreement of 1977–80, which is the key contract in this case, has an entirely different bargaining unit from the one agreed to by Malcolm Boring in 1962. The 1977–80 Southern California Master Labor Agreement is an agreement between employers and a number of different unions including Carpenters, Laborers, and Teamsters. Even assuming that the Local 12 part of the master labor agreement can be severed from the remainder of the agreement in such a way as to be binding on Malcolm Boring, there are serious ambiguities with regard to the scope of the unit. The 1977–80 master labor agreement did not contain in the basic unit description language that had appeared in prior agreements concerning coverage of the contractors' yards and shops. Similar language was used in the 1977–80 agreement but it was included in an appendix related to special working rules for the operating engineer craft. There is serious doubt as to whether the parties ever intended that shop employees as opposed to construction employees should be covered in light of the fact that the short-form agreement signed by Malcolm Boring in 1962 had the box for construction checked but not the box for shop. In view of all these ambiguities it is particularly important to look to the practice of the parties.

Malcolm Boring traditionally hired unskilled employees. When those employees obtained a sufficient degree of skill, they were permitted to join Local 12 and to enjoy coverage by the contract. That practice was followed openly over the years. The evidence does not establish that the practice was a result of deception or mis-

representation by Malcolm Boring. On occasions Malcolm Boring had to argue with Local 12 before Local 12 would accept the fact that employees had sufficient skills to be allowed to join the Union. An argument could be made that Local 12 considered the contract to be a members-only agreement that did not apply to nonmembers. Looking at the situation more favorably from Local 12's point of view, Local 12 required employees to have a certain degree of skill before joining the Union and, when they had attained that degree of skill, they also were eligible for coverage under the contract. In any event, the practice was for the contract to cover skilled construction employees of Malcolm Boring. B. C. Malcolm shop employees were never covered. In sum, I do not believe that the General Counsel has established that the voluntary agreement of the parties, as construed in the light of their practices, included shop employees in the scope of the unit.

Under all these circumstances, I find that the employees of B. C. Malcolm are in a separate bargaining unit from the employees of Malcolm Boring and that any contract that Malcolm Boring had with Local 12 did not apply to the employees of B. C. Malcolm. In light of that finding, I recommend that the allegation that Malcolm Boring and B. C. Malcolm refused to bargain with Local 12 in violation of Section 8(a)(5) of the Act be dismissed.[26]

E. *The 8(a)(1) Allegations*

Paragraph 11 of the complaint alleges that in or about October 1979 Billy C. Malcolm violated Section 8(a)(1) of the Act by stating to employees at the Chino facility "that he intended to end his construction boring business, in order to discourage activity on behalf of or in support of the IUOE." David Frederick testified that, in August or September 1979, Billy C. Malcolm told him that he had negotiated a contract for Bruce Malcolm with NMU, that Bruce was going to try that Union, and that B. C. Malcolm was considering signing with that Union. As set forth above, Billy Malcolm denied that that conversation took place and I have credited Billy C. Malcolm. Larry Cochell testified that, in June 1979, Billy C. Malcolm told him that Malcolm Boring would be closing down in January 1980. Cochell also testified that in late September or October 1979 Billy C. Malcolm told him that he was going to turn the boring business over to the boys and start a pipe business.[27] Billy C. Malcolm testified that he never told Cochell that he would close down his boring business. As between Billy C. Malcolm and Cochell, I credit Billy C. Malcolm.[28]

Paragraph 12 of the complaint alleges that in or about October 1979 Billy C. Malcolm interrogated an employee at the Chino facility regarding his union sympathies and membership. Larry Cochell testified that, in the latter part of September or early October 1979, Billy C. Malcolm spoke to him in the shop and asked him what his thoughts were on the NMU. He averred that Billy C. Malcolm mentioned some of the benefits of the NMU. Although I have some doubts as to Cochell's credibility, Billy C. Malcolm did not testify with regard to that conversation and I credit Cochell. However, in the entire context of the situations, as set forth above, I do not believe that that one isolated question interfered with, restrained, or coerced Cochell or any other employee in the exercise of his rights guaranteed by Section 7 of the Act.

Paragraph 13 of the complaint alleges that in or about October 1979 Bruce C. Malcolm interrogated an employee at the Chino facility regarding his union sympathies and membership. Cochell testified that, about the first of October 1979, Bruce C. Malcolm asked him what his thoughts were about the NMU and told him that he had signed a contract with that Union. As found above, Bruce C. Malcolm was not a single employer with Malcolm Boring or B. C. Malcolm. At that time Bruce C. Malcolm had his own business and Cochell was not his employee. Bruce C. Malcolm and Cochell had been friends and it appeared that Bruce C. Malcolm was merely asking Cochell's advice concerning his new business. I do not believe that Bruce C. Malcolm's question in any manner interfered with, restrained, or coerced Cochell or any other employee in the exercise of rights guaranteed by Section 7 of the Act. I shall recommend that all of the 8(a)(1) allegations in the complaint be dismissed.

CONCLUSIONS OF LAW

1. Malcolm Boring, B. C. Malcolm and Bruce Malcolm, Inc., are, and each is, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local 12 and NMU are and each is a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the credible evidence that Malcolm Boring, B. C. Malcolm, Bruce Malcolm, Inc., or NMU violated the Act as alleged in the complaint.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

[26] As the United States Supreme Court held in *N.L.R.B.* v. *Local Union No. 103, International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO* [*Higdon Construction Co.*], 434 U.S. 335, 345 (1978): "The employer's duty to bargain and honor [an 8(f)] contract is contingent on the union's attaining majority support at the various construction sites." The Board has held that that duty also applies where a union attains majority status in a bargaining unit consisting of a permanent stable work force which moves from jobsite to jobsite. *Precision Striping, Inc.*, 245 NLRB 169 (1979), enforcement denied 642 F.2d 1144 (9th Cir. 1981). The General Counsel contends that the Union did secure majority status in such a permanent stable work force. As to part of that argument, the General Counsel lumped together the construction and nonconstruction employees, deleted from the unit employees who had not worked a certain number of days within a given period, and counted as part of the bargaining unit workers who were the sons of the owner. However, in view of the conclusions reached above, there is no need to decide the question of majority status.

[27] It is noted that Local 12 Business Agent Dye did not contact Malcolm Boring concerning its claim that shop employees were covered by the contract until December 1979.

[28] Even if Cochell were credited, it would be clear that the alleged threat had nothing to do with Local 12's claim that the contract covered shop employees. The threat allegedly occurred in October 1979 and Local 12's claim was made in December 1979.

ORDER[29]

The complaint is dismissed in its entirety.

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[29] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.